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EPA

# OECA Echo

Enforcement and Compliance Assurance for a Cleaner Environment



***One of largest environmental criminal investigations ever***

## Iroquois Pipeline Company to Pay $22 Million Penalty For Violations Against Clean Water Act

### *Wetlands Harmed During Pipeline Construction*

In one of the largest environmental criminal prosecutions in U.S. history, EPA and the Department of Justice reached a settlement in May with the Iroquois Pipeline Operating Company and four of its top corporate officials and field supervisors.

The company and its personnel pled guilty to violations of the Clean Water Act (CWA) stemming from the construction of an underground natural gas pipeline from Ontario, Canada to Long Island, New York. Under the terms of the settlement, Iroquois Company will be required to clean up 30 wetlands and streams damaged during the construction of the pipeline, and pay a total of $22 million in criminal and civil penalties for knowingly violating a number of environmental and safety provisions of the pipeline construction permit, $2.5 million of which will be used to create additional wetlands.

The case is the second largest environmental prosecution and enforcement action conducted by the United States, exceeded only by the $1 billion Exxon Valdez settlement. "This criminal prosection of the Iroquois Company and its officers shows that the federal government — and the public it serves — simply will not tolerate corporations that disregard their environmental responsibilities in pursuit of 'the bottom line'," said Steve Herman,

*(Continued on page 4)*

***From the Assistant Administrator***
Steven A. Herman

## *Faster Cleanup, Less Litigation Expected at Superfund Sites Because of CERCLA Administrative Reforms*

On June 5, Administrator Browner took several major steps to implement the Superfund Administrative Reforms designed to accelerate the Clinton Administration's continuing efforts to make Superfund cleanups "faster, fairer and more efficient."

At a press briefing in which both OSWER Assistant Administrator Elliot Laws and I participated, the Administrator issued two new policies which provide for partial agency funding of the cost of "orphan shares" at Superfund sites, and expands the current "demicromis" party definition in order to remove thousands of additional small parties from Superfund liability, respectively. She also announced that, after concluding negotiations with the Treasury Department and the Office of Management and Budget (OMB), the agency will be able to establish interest-bearing settlement accounts to dedicate funds for cleanup actions at specific Superfund sites.

By shifting the program from litigation to prompt cleanup of the nation's worst toxic waste dumps, while at the same time reducing the amount and cost of litigation, these reforms will, in the Administrator's words, " ... help cleanup Superfund sites while still providing protection for public health and the environment for the one in four Americans living near a toxic waste site."

*(Continued on page 2)*

# Superfund Reforms Will Speed Cleanups, Cut Suits

*Continued from Page One*

Under the "orphan share compensation" policy, EPA will help cover a portion of the cleanup costs attributable to parties who are now insolvent or defunct ("orphan share") at Superfund sites where financially capable responsible parties agree to perform the cleanup. This year, EPA expects to offer parties over $50 million nationwide towards covering the orphan share at sites where cleanup agreements are being negotiated. Under CERCLA's strict, joint and several provisions, liable parties are responsible for the total costs of cleaning up a site, including the orphan share. By paying the orphan share from the Trust Fund, EPA will speed up cleanups by making it more attractive for potentially responsible parties (PRPs) to enter into cleanup agreements.

The second policy expands the agency's 1993 "demicromis" policy which clearly stated EPA's intention to protect very small volume waste contributors. The revised policy increases the number of very small volume waste contributors eligible for "demicromis" settlements by doubling the threshold amount of waste to .2 percent of municipal solid waste at a site or .002 percent or the equivalent of two drums of materials containing hazardous substances without having to pay for a portion of cleanup costs. This policy also protects them from "third-party" suits from larger waste contributors. For these small parties, many of whom are municipalities and small businesses, the cost of legal and other representation services would likely exceed the party's proportional share of costs to clean up the site. Fairness and common sense dictate that these very small contributors should not have to navigate through the often complex and lengthy settlement process.

The agency also reached agreement with OMB and the Department of the Treasury that Special Accounts — site-specific accounts used for deposit of settlement funds — will earn interest which can accrue directly to those accounts. This change will be a further incentive for PRPs to settle with EPA since settlement funds will now earn interest that can be applied to additional cleanup work at a specific site, leaving more Trust Fund revenues for cleanups at sites where responsible parties are insolvent or cannot be found.

The last three years have amply demonstrated the American people want results, not bickering, and these common sense reforms will produce more and faster Superfund site cleanups and greater protection of the public health and welfare.

**United States Environmental Protection Agency:**

Carol M. Browner
*Administrator*

**Enforcement and Compliance Assurance:**

Steven A. Herman
*Assistant Administrator*

**Enforcement Capacity and Outreach:**

Anne Lassiter
*Director*

Pete Rosenberg
*Associate Director*

**Editorial Staff:**

Roger Allan
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Art Horowitz
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Jonathan Packman
Lou Paley
Shirley Pate
Susan Susanke

**United States EPA**
**401 M St., SW (2225)**
**Washington, DC 20460**
**(202) 260-6777**

## 100 International Entities at Thailand Meeting

About 200 government and non-government environmental leaders from nearly 100 countries and international organizations met in Chiang Mai, Thailand, April 22-26, for the fourth International Conference on Environmental Compliance and Enforcement, co-chaired by OECA Assistant Administrator Steven A. Herman.

Held to promote the importance of effective environmental compliance and enforcement, the conference's objectives were to increase international capacity building and to strengthen expertise in the field of environmental compliance and law enforcement, increasingly viewed as an area requiring international cooperation and coordination.

The conference was organized jointly and co-sponsored by The Netherlands' Ministry of Housing, Spatial Planning and the Environment, the U.S. EPA, Environment Canada, the European Commission, the United Nations Environment Program, the Environmental Law Institute, and the Ministry of Environment in Thailand. The conference's executive planning committee included representatives of the United Nations Development Program, World Wildlife Fund, Environment Ministries of Mexico, Chile, the United Kingdom, Poland, Hungary, Nigeria, Egypt, South Africa, China, Malaysia and the Philippines.

Besides Herman and Cheryl Wasserman, of EPA, who managed the conference, U.S. attendees included three other EPA officials, one Department of Justice representative, seven state officials, and two representatives of non-government organizations.

***Conference proceedings, support documents, and networking information will be available on the Internet accessible through EPA's Enviro$en$e homepage or Earth 1 with linkages to the homepages of other conference sponsors.***

# EPA, Customs Join Forces to Fight Pollution at Border

## May Compliance Sweep Follows Signing of March MOU Pact

EPA and the U.S. Customs Service have combined forces to coordinate enforcement of U.S. environmental import-export laws under a Memorandum of Understanding (MOU) signed on March 4, 1996, by OECA Assistant Administrator Steven A. Herman and U.S. Customs Commissioner George Weise.

B ehind the action was the recognition that tighter government controls, particularly over domestic production of chloroflorocarbons (CFCs) and other ozone depleting substances, have created a large market for illegal imports, with illegal CFCs now being considered the most lucrative contraband in the U.S. after illicit drugs.

**The MOU covers both import and export** violations, and the enforcement of FIFRA, TSCA, CAA, and CERCLA regulations. It revises and expands the scope of an MOU developed in 1987 by EPA and the Customs Service, which was limited to hazardous waste export regulations under RCRA.

Customs statutes covered by the MOU include the Anti-Smuggling Act, Foreign Trade Zones, the Export Administration Act, and the Tariff Act of 1930. The MOU also applies to international agreements, including the Montreal Protocol on Substances That Deplete the Ozone Layer, and the U.S.-Mexico Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area. The three main elements of the MOU deal with joint assistance and investigations, training, and data collection and information sharing. The MOU contains two annexes, covering civil and criminal enforcement respectively.

**Under Annex I, which pertains to training, data** and information exchange, and compliance monitoring activities for the civil enforcement of transboundary laws, EPA will train Customs inspectors on the identification, monitoring and sampling of hazardous waste shipments and for non-conforming vehicles. Customs inspectors will notify EPA investigators of suspect shipments and will voluntarily transmit to EPA copies of hazardous waste manifests the service receives from hazardous waste importers. EPA investigators will assist the service in monitoring and spot-checking shipments of hazardous wastes.

Annex II contains the protocols from EPA-Customs activity regarding criminal enforcement. If Customs discovers a potential environmental violation or hazard, it will promptly notify EPA. EPA will promptly notify Customs about any hazardous waste activity it detects that is under the jurisdiction of the service. Both agencies may enter into a joint criminal investigation on a case-by-case basis, with EPA providing the technical and laboratory support pertaining to environmental violations.

**MOU Gets Fast Implementation**

Implementation of the MOU received a fast workout when on May 1 more than 200 federal, state, and provincial law enforcement officials from the U.S. and Canada participated in a joint action aimed at detecting illegal shipments of hazardous wastes and other dangerous substances at commercial entry border points across New York, New Hampshire, Maine, and Vermont.

Dubbed "Operation Greenline," the environmental compliance sweep ran from six a.m. on May 1 to 11 a.m on May 2 and covered a 1,300

## Cooperative Undertaking Covers 1,300 Mile Stretch Of U.S., Canada Border

mile stretch along the border. Specialists from Customs, EPA, and the states performed multi-media inspections on trucks and other vehicles carrying hazardous wastes, PCBs, petroleum products, pesticides, pressurized gases, and other chemicals.

**An estimated 250 trucks were pulled over** during the sweep. Four trucks carrying chemical substances failed to have the required certification for carrying these chemicals and are being investigated further. At least five trucks were detained for safety violations.

Participating in the operation were environmental criminal investigators, customs agents and technical enforcement personnel from both sides of the border, including representatives from EPA, Environment Canada, the U.S. Customs Service, the Royal Canadian Mounted Police and the Quebec Ministry of Environment Policy, and the states of New York, Maine, New Hampshire, and Vermont. Attorneys from the New York State Attorney General's office and the Justice Department provided legal support.

**Part of a cooperative program involving** the U.S., Canada, and Mexico, the sweep was conducted with the assistance of the North American Commission for Environmental Cooperation. Mexico sent an official observer to the operation.

**( Contacts: Mike Penders, (202)564-2526 and Mike Alushin, (202)564-7137)**

**MOU covers import, export violations, and enforcement of FIFRA, TSCA, CAA, and CERCLA regulations.**

**Customs statutes covered include Anti-Smuggling Act, Foreign Trade Zones, Export Administration Act, and the Tariff Act of 1930.**

# Clean Water Act Violations Lead To $22 Million Fine

*Continued from Page 1*

EPA's Assistant Administrator for Enforcement and Compliance Assurance. "The company illegally cut corners in utter disregard of the potentially devastating consequences for both the environment and the safety of the pipeline itself. They have learned that if they callously disregard the law they will be caught and punished, and that is a very expensive lesson."

The company pled guilty to four felony counts filed in the U.S. District Court for the Northern District of New York, in Syracuse. As part of the financial penalties, Iroquois will pay a $15 million CWA criminal fine — equaling the largest single monetary penalty in the 26- year history of the Act — as well as a $5 million civil CWA penalty. In addition to these fines and penalties, the company will be unable to pass on to consumers in the form of higher rates another $20 million directly or indirectly related to the construction of the pipeline, due to their criminal admissions.

***Iroquois fine equals largest single monetary penalty in 26-year history of the Clean Water Act .***

The four company officials and supervisors, who individually pled guilty to various counts of negligently violating the CWA, are subject to one year in jail and a $100,000 fine. The federal government will ask the court to sentence cooperating defendants to six months of incarceration to be served in home confinement.

One of the felony counts to which the company pled guilty involved failure to cleanup or otherwise restore 188 streams and wetlands. The construction permit issued by the U.S. Army Corps of Engineers required Iroquois to backfill soil excavated during the laying of the pipeline and restore all adversely affected wetlands along the right-of-way. But many mounds of soil were left standing in the wetlands. This interrupted the overall circulation of waters in the wetlands, and reduced their size, damaged aquatic life, and eliminated stream bottom habitat. After the company learned that it was the object of a federal criminal investigation, it went back and began to restore a number of the affected streams and wetlands.

The company also pled guilty to having failed to construct safety devices called "trench breakers" at regular intervals along the pipeline ditch and at the edge of wetlands. These devices control soil erosion and corrosion of the pipeline by stopping water from migrating along the pipeline, especially where the terrain slopes. F ailure to install the required number of breakers within the trench could have washed out the soil which holds the pipeline securely in place. The absence of the breakers adjacent to wetlands could cause significant ecological damage by reducing their ability to retain water.

In addition to restoring the 30 damaged wetlands, $2.5 million of the fines paid by Iroquois will go to the National Fish and Wildlife Foundation to create additional wetlands in the vicinity of the pipeline. The company will be required to continually monitor the pipeline to make sure that no safety or related problems result from their improper placement of large rocks inside the trench when the pipeline was buried. Rocks greater than 18 inches in diameter, discovered in the pipeline trench during the criminal investigation, could dent the pipeline and eventually cause it to rupture.

Construction of the 370-mile long pipeline, which crossed more than 500 rivers, streams and wetlands, took place between May 1991 and January 1992. The two-year federal investigation was conducted by EPA's Criminal Investigation Division, the Federal Bureau of Investigation, the U.S. Army, the Department of Energy, the Federal Energy Regulatory Commission, and the U.S. Department of Transportation.

## $5.5 Million Fine Against Marine Shale Processors Is Upheld

The Fifth District Court of Appeals in April upheld a $5.5 million fine and other judgements against Marine Shale Processors Inc. for illegally burning, storing and discharging hazardous waste at its Amelia, LA plant. In 1994, the U.S. District Court in New Orleans ruled the company illegally stored hazardous waste, discharged it into Bayou Beouf, and emittedvarious pollutants into the air.

MSP claimed the product of incinerated waste was to be used in producing recycled materials. But the product contained high levels of pollutants, including lead. The government sued in 1990 under RCRA and obtained a preliminary injunction barring MSP from moving incinerated ash off the plant site. It also alleged violations of the Clean Water Act and the Clean Air Act.

EPA denied MSP's application for a permit under the Boiler and Industrial Furnace Regulations. The company appealed to EPA's Environmental Appeals Board and, after losing, appealed to the Fifth Circuit.

The court held that EPA properly denied the company's application for a permit and that EPA's appeals board correctly determined that MSP was not an industrial furnace engaged in recycling; that it did not have authority to store hazardous wastes; that it unlawfully placed hazardous waste residues on the ground; and affirmed the district court's imposition of large fines for violations of the Clean Air Act. It also agreed that a permit limiting MSP's air emissions is federally enforceable.

# Revised RCRA Enforcement Response Policy In Effect

OECA bolstered its reinvention of environmental regulations by issuing a revised Hazardous Waste Civil Enforcement Response Policy (ERP) on March 15. The revised policy incorporates a risk-based approach to enforcement and gives federal and state authorities greater enforcement flexibility to address RCRA violations by small businesses, small communities, and facilities that conduct self-audits.

The revised ERP, developed by OECA in collaboration with states, gives both levels of government greater ability to focus enforcement resources against significant violators. The policy contains flexible and practical guidelines that provide a nationally consistent enforcement approach to safeguard protection of human health and the environment, while also acknowledging the distinctive enforcement processes of the individual states. The policy also establishes workable enforcement response schedules for the implementing agencies.

Among its most significant advances, the revised ERP:

(1) Establishes timely enforcement criteria that take into account alternative state enforcement processes, case complexity, supplemental environmental projects, multimedia concerns and enforcement initiatives;

(2) Develops a definition of "return to compliance" that creates a more accurate compliance picture by recognizing facilities currently on lengthy compliance schedules as having "returned to compliance"; and

(3) Emphasizes a facility-wide, risk-based approach to classifying violators that simplifies the system used to designate violators for the purpose of determining the appropriateness of an enforcement action. This is expected to increase the consistency of classification among states and regions.

The revised policy was effective April 15.

***Revised ERP improves ability to focus enforcement resources against significant violators.***

## What's My Job

**Gary A. Jonesi, Chair**
Audit Policy Quick Response Team

The Audit Policy Quick Response Team (QRT) was created to make expeditious, fair, and nationally consistent recommendations concerning the applicability of the interim and final audit policies to specific enforcement cases. The team includes audit policy experts from each of the ORE media divisions, OC, OPPA, OCEFT, FFEO, the Department of Justice, and Regions I and V. To date, the QRT has evaluated more than two dozen cases for potential audit policy application, most of which have resulted in significant gravity-based penalty reductions.

One of the primary functions of the QRT is to identify — and develop answers for — novel, unique or otherwise nationally significant issues that may require further guidance or interpretation. In one case, for example, a company asked whether the audit policy's "voluntary discovery" requirement meant that it would not be eligible for penalty mitigation if it agreed to incorporate an audit commitment that it made before any enforcement response, as part of a subsequent binding settlement agreement. The company was concerned that any violations discovered as a result of the audit automatically would be ineligible for penalty mitigation if the company agreed to incorporate its prior audit commitment into a consent order or decree, whereas omitting such an audit obligation from the settlement would not preclude the company from obtaining future penalty mitigation.

Given this unintended disincentive, the QRT was able to develop a creative, yet supportable, interpretation that preserved the company's ability to demonstrate eligibility in the future for penalty mitigation under the audit policy. This interpretation created a "win-win" situation benefitting the government as well as the company. By allowing audit provisions in settlements to be considered voluntary in these limited circumstances where the audit commitment was made prior to any enforcement response, EPA is able to shape the content and timing of audits, ensure their performance through enforceable terms, and more effectively achieve the goals of the final policy.

The QRT is currently developing additional policy interpretations in a "question and answer" format, dealing with such issues as defining the "baseline" from which penalties will be mitigated, deciding whether companies planning to audit multiple facilities can send the agency one consolidated notification, as opposed to separate notices for each facility, and whether non-penalty actions (such as receipt of a NOV) count as "previous" violations with respect to the policy.

Our goal is to develop and compile all of the interpretations in a single guidance document to be available this summer. We also are coordinating with the Audit Policy Implementation Task Force chaired by OPPA to establish a process to ensure widespread and prompt communication of all audit policy interpretive determinations throughout OECA, the regions, and to the regulated community.

***Audit policy response team has evaluated more than two dozen cases for potential audit policy application.***

**At OECA National Conference**

# *Case Made for Strong Enforcement Program*

## Work Group Formed To Develop Principles For Integrated Program

***Browner:***

***Groundwork has been laid for "a new generation of environmental enforcement."***

***Compliance initiatives are important, but do not replace a strong enforcement program.***

More than 250 senior federal, regional, state and Department of Justice environmental professionals heard the message that strong enforcement is the underpinning of an integrated enforcement and compliance assurance program at OECA's second annual National Enforcement and Compliance Assurance Conference in Washington, April 9-11.

In her keynote address, Administrator Carol M. Browner said the Clinton Administration has laid the groundwork for "a new generation of environmental enforcement." She said recent compliance initiatives, such as the innovative small business and small communities compliance incentive policies, while important approaches, supplement— but do not replace— a strong enforcement program.

The constant 20 percent of industry that does not comply with environmental regulations, Browner said, cannot be forgotten. "We have to address each of the types we find," she said. "We have to be there to hand them the recipe. They are why a strong enforcement program is necessary."

**The message was reiterated by Assistant Ad**ministrator Steve Herman, who noted that enforcement is the mechanism that makes compliance assistance work. It is also a way to deter future violations, and a means of ensuring a level field for those who comply.

"Much of the rhetoric and discussion over the past 18 months has been on changes and on our new compliance tools. I think this emphasis was necessary and essential to affect change — to initiate something new. However, I want to say simply, and as clearly as I can, strong enforcement cannot be replaced, and a strong compliance program cannot succeed without strong enforcement," Herman said.

To provide Regions practical answers about how to most effectively implement an integrated compliance and enforcement program, Herman at the end of the conference appointed a work group to develop program operating principles. Chaired by Deputy Assistant Administrator Michael Stahl, the group consists of Eric Schaeffer, Director, Office of Planning and Policy Analysis; Barry Breen, Director, Federal Facilities Enforcement Office; Bill Muszynski, Region 2 Deputy Administrator; Marcia Mulkey, Region 3 Counsel; and Sam Coleman, Director of Region 4's compliance assurance and enforcement division.

The work group's objective is to produce a document that will help managers and staff make day-to-day decisions while leaving room for individual decision making. Among other questions, it will seek to develop a definition of compliance assistance, define the appropriate use of compliance assistance and its role in the overall program, and describe an appropriate mix of enforcement and compliance assurance tools needed to produce an effective integrated program.

## *Senior Officials Address OECA National Conference*

In addition to Administrator Browner and Assistant Administrator Herman other plenary speakers at OECA's April national conference included Deputy Administrator Fred Hansen, New England Regional Administrator John P. DeVillars, U.S. Assistant Attorney General Lois J. Schiffer, and Indiana Deputy Environmental Commissioner Michael O'Connor. Among them, they covered such topics as the role of compliance assistance in an "integrated" enforcement and compliance program, the future of federal-state relationships, and the need for both a civil and criminal enforcement program.

Breakout sessions covered risk-based targeting, EPA audit and state privilege statutes, environmental justice, and enforcement and compliance success measures.

Of the more than 250 attendees, about 100 were from headquarters with an equal number from the regional offices. Other participants were from DOJ and various state, local and tribal governments. International guests were from Canada, Mexico, and Guatemala.

**(Contact Winston Haythe,(202)564-6057.)**

***Case Closed***

# *Colorado PSC Clean Air Settlement Is Second Largest*

EPA and the Department of Justice announced on May 22 a $140 million pollution control settlement with the Colorado Public Service Company (PSC) and its partners -- the second largest expenditure in the history of the Clean Air Act -- that will dramatically reduce air pollution and protect public health. The settlement will improve the quality of lakes and streams, and increase visibility in northwestern Colorado's Mt. Zirkel Wilderness Area.

The consent decree resolves allegations by the federal government, the State of Colorado, and the Sierra Club, that PSC's Hayden power station violated Clean Air Act pollution limits, obscured visibility, and increased acid levels in snow.

PSC will spend the $140 million to install state-of-the-art pollution controls to reduce particulate, sulfur dioxide (SO2) and nitrogen oxide (NOx) emissions at the Hayden facility, located in the Yampa Valley west of Steamboat Springs. PSC, the Salt River Project, and Pacificorp also will pay a $2 million civil penalty. The three utilities will contribute another $2.25 million to a Land Trust Fund to purchase additional land in the Yampa Valley to prevent development in sensitive areas, and for other environmental projects. Particulate matter, SO2, and NOx all contribute to visibility impairment in the wilderness area, and emissions from them can cause severe environmental damage.

The Hayden power plant currently has no emission controls for SO2 or NOx and ineffective controls for small particulate pollution. The settlement requires PSC to install controls by 1999, at least five years sooner than it would otherwise have had to under current law. The government estimates future annual emissions from the facility will drop from 16,000 tons to 2,400 tons for SO2 (85 percent) and 14,000 tons to 7,000 tons for NOx (50 percent).

**PSC was charged with thousands of violations** involving opacity, the visible air pollution emissions from a facility's smokestacks. In 1995, the court ruled in favor of the Sierra Club that PSC was liable for the Clean Air Act violations. The required new controls will remove over 99 percent of the particulate emissions at the plant, which, with the SO2 reductions, will greatly improve visibility in the Mt. Zirkel wilderness area. The settlement will reduce particulate matter pollution in Steamboat Springs by funding a special project to convert woodstoves and gas- or diesel- powered vehicles to natural gas.

The action settles a lawsuit against PSC brought by the Sierra Club in 1993. The federal government and the state intervened in the suit following a notice of violation by EPA in January 1996.

***$140 million pollution control settlement with Colorado PSC , the Salt River Project, and Pacificorp will dramatically reduce air pollution in Mt. Zirkel Wilderness Area.***

# *Final Small Business Policy Now In Effect*

EPA 's final policy on compliance incentives for small businesses was released in May and became effective June 10. Aimed at providing small businesses expanded incentives and opportunities to comply with environmental laws, the policy sets guidelines and criteria for the agency to reduce or waive penalties for small businesses that make good faith efforts to correct violations under most EPA statutes. The policy also implements Section 323 of the Small Business Regulatory Flexibility Act of 1996.

The policy applies to companies employing 100 or fewer persons across all facilities and operations owned by the entity. Facilities can demonstrate good faith either by conducting a self- or third-party compliance audit and promptly disclosing and correcting the violations, or by getting on-site compliance assistance from a state, federal or other government-sponsored compliance assistance program and correcting the violations. If the business uses a confidential compliance assistance program, it may get penalty relief by promptly disclosing all violations to the appropriate regulatory agency.

Under an interim policy issued June 15, 1995, small businesses were only able to get penalty relief if they sought government-sponsored compliance assistance to help identify and correct a violation of environmental law. The final policy extended the "good faith" demonstration to third party or self-audits.

**For the policy to apply, a violation must be a** first time, non-criminal one that does not pose a significant threat to public health, safety or the environment. If the violation is corrected within 180 days, or 360 days using pollution prevention, EPA will eliminate the entire penalty. If a business meets all criteria but takes additional time to correct the violation, or, in the rare event that the small business has obtained a significant economic benefit from the violation(s) that gives it an economic advantage over its competitors, EPA will waive up to 100 percent of the gravity or punitive portion of the penalty but may seek the economic benefit gained through noncompliance, an action expected to eliminate any economic advantage violators have over companies that comply with the law.

EPA will defer to state enforcement actions that are consistent with the policy. The agency will continue to encourage states to develop flexible enforcement policies which build on the their existing compliance assistance programs.

The policy applies to pending cases where penalty agreement has not been reached.

# OECA Issues Guidance on State Immunity Laws

## Applies To Clean Air Act Title V Programs

Since 1993, 18 states have passed laws that protect companies from disclosure or punishment when they voluntarily find and correct environmental problems. As these numbers increase, OECA has issued guidelines on how to evaluate their impact on decisions Regional offices must make regarding final delegation of authority for state supervision of the Clean Air Act's Title V (operating permits) program.

The guidelines are contained in an April 5, 1996 memorandum from OECA Assistant Administrator Steve Herman and OAR Assistant Administrator Mary Nichols to Region X Counsel Jackson Fox.

Before a state's operating permits program can receive final approval, EPA must determine that the state's permit program meets minimum standards established under law. In particular, Section 502(b)(5)of the CAA requires states to have "authority to enforce the terms and conditions of Title V permits...regardless of whether they are administered by EPA or state agencies." Section 502 also requires states to have authority to recover "appropriate" penalties for criminal conduct.

**While affirming EPA's December 18, 1995** self-disclosure policy providing for reduced civil penalties and recommending that states not pursue criminal prosecution for certain types of violations corrected through voluntary self-policing, the Herman-Nichols guidance states that "EPA has consistently opposed blanket amnesties which excuse repeated noncompliance, criminal conduct, or violations that result in serious harm or risk, as well as audit privileges that shield evidence of violations from regulators and jeopardize the public's right-to-know-about noncompliance."

The guidance further states that "Any [state] legislation that immunizes willful, intentional, or knowing criminal conduct conflicts with this requirement, and must be amended before final Title V approval may be granted," emphasizing that state laws providing immunity from certain civil penalty assessments also should not be approved.

Broad state privilege laws specifically directed at evidence related to environmental violations will be evaluated on a case-by-case basis. But, essentially, a state must have access to evidence to determine whether violations have been corrected. At a minimum, state law must not limit an agency's access to information that federal or state laws or regulations require to be collected, maintained, reported, or otherwise made available.

**Excessively broad state privilege laws** loosely defining "audit" should also be avoided, among other considerations: "[They] may shield so much information as to significantly impede enforcement efforts, or may lead to very broad assertions of privilege that consume inordinate time and resources to resolve," the guidance states.

EPA will consult with individual states to identify specific provisions that must be changed before final approval can be granted, and provide those states with opportunity to make those corrections.

**(Contact: Brian Riedel, (202)564-5006.)**



EPA

**U.S. Environmental Protection Agency**
**Mail Code 2225**
**401 M St., SW**
**Washington, DC 20460**

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